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THE WINDS OF CHANGE: THE MISSISSIPPI SUPREME COURT EXAMINES CONCURRENT CAUSATION IN HURRICANE KATRINA CLAIMS

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I. INTRODUCTION

Hurricanes are a fact of life on the Mississippi Gulf Coast. Residents who choose to live on the coast accept this risk with the expectation that their homeowners insurance will cover any damage that a hurricane may cause. They pay their premiums and depend on their insurance to provide for their needs if the worst should happen. Conversely, insurance companies base their business on uncorrelated risk, choosing not to cover the potentially devastating losses of catastrophic events such as hurricanes. If unable to avoid these types of risks, the insurance market suffers economic consequences, which are passed along to consumers.

As a consequence of these opposing dynamics, insurance companies often include terms and provisions in their policies intending to avoid coverage for the exact type of loss that the policy purchaser fears and hopes will be protected. The homeowners may not even be aware of these provisions or their intended results until, faced with the devastation of a hurricane, they file a claim that is denied. At this time of extreme need, the insureds discover that their policy does not meet their expectations or provide necessary relief. Because the policy-holder and the insurance company disagree on the meanings of the terms and provisions and the type of coverage provided, the court becomes the ultimate interpreter of the policy.

The Corbans and United Services Automobile Association ("USAA") faced this situation in the aftermath of Hurricane Katrina when the Corbans' home was severely damaged and USAA denied their claim based on a provision in the policy called the anti-concurrent causation clause. The case turned upon the issue of causation—specifically whether wind, water, or a combination of the two perils caused the claimed losses. While federal district and circuit courts had heard and decided cases concerning Hurricane Katrina damage, *Corban v. USAA* was the first opportunity for the Mississippi Supreme Court to issue an opinion on the matter. For this reason, the *Corban* opinion was not only important to the parties involved, it

* The author would like to thank the faculty and administration of the Mississippi College School of Law, with special thanks to Professor Jeffrey Jackson for supervising this Note and for encouraging me to not only analyze the court's opinion but also to question its future implications. This case shows the difficult role that the court must play when attempting to balance the interests of victims of natural distasters and an industry which must survive in order to help those victims. I would like to express my appreciation for the judges who bear that burden. Lastly, none of my hard work would be possible without the constant encouragement and support of my two daughters, Hannah and Emma, and my parents, Molly and Bill. I am forever grateful to them for all that they do.

also established modern Mississippi law on causation, which will affect insurers and insureds in future cases.

This Note details the significance of *Corban* as well as its similarities and differences with other Hurricane Katrina cases. Parts II and III give the facts and procedural history of the case. The background and history of the law regarding the rules of contract interpretation as well as insurance causation are explained in Part IV. Next, Part V summarizes the analysis and reasoning applied by the Mississippi Supreme Court as it reached its decisions on the three issues presented in the interlocutory appeal. Finally, Part VI explains how the opinion of the Mississippi Supreme Court, while bold for its disagreement with the Fifth Circuit Court of Appeals over the issue of the applicability of the ACC clause, has roots not only in cases prior to Hurricane Katrina but also in the District Court for the Southern District of Mississippi and the Harrison County Circuit Court in post-Katrina cases.

II. SUMMARY OF THE FACTS

On August 29, 2005, Hurricane Katrina slammed into the Mississippi Gulf Coast, leaving a vast area of damage and destruction.[1] Magruder and Margaret Corban's Long Beach, Mississippi, home was devastated by the hurricane force winds and the following storm surge.[2] The residential dwelling, along with the garage, guest cottage, and other structures located on the property, sustained damages estimated at $1,607,926.[3]

The Corbans' home was insured by USAA under two separate policies—a homeowner's policy and a flood policy.[4] The homeowner's policy, an all-risk policy, included an exclusion for water damage and an accompanying anticoncurrent causes (ACC) clause.[5] The relevant portions of the policy stated:

> 1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

1. Corban v. United Servs. Auto Ass'n, 20 So. 3d 601, 605 (Miss. 2009).

2. *Id.* at 605, 614.

3. *Id.* at 606.

4. *Id.* at 605–06.

5. *Id.* at 609–10, 622 (defining an "all-risk" or "all-peril" policy as one that covers losses caused by all perils "not expressly excluded" in the policy. "Named peril" policies provide coverage only for perils specifically listed in the policy.). *See* Joseph Lavitt, *The Doctrine of Efficient Proximate Cause, the Katrina Disaster, Prosser's Folly, and the Third Restatement of Torts: Cracking the Conundrum*, 54 LOY. L. REV. 1, 2–6 (2008) (stating the insurance industry's need to exclude all correlated risks (also referred to as calamitous perils) in "all-risk" policies in order to avoid "dwarf[ing] the resources of insurers liable to pay for rebuilding" devastated communities after catastrophes). *Corban*, 20 So. 3d at 616–17 (discussing the incorporation of ACC clauses in homeowners insurance as a means to exclude correlated risks).

> c. Water damage, meaning: (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind . . . .[6]

After filing their claim, the Corbans received the liability limits on the flood insurance policy: $250,000 for loss to the dwelling and $100,000 for loss to contents.[7] The homeowner's policy, however, required a more extensive examination than the USAA adjusters could provide.[8] Retained by the adjusters, the Haag Engineering Company (Haag) inspected the property, specifically to establish whether the damage was caused by wind or water.[9] Because the Corbans' all-risk homeowner's policy contained an exclusion for flooding, this determination was crucial.[10]

The Haag report asserted that all damage to the first floor was caused by "flooding and wave wash."[11] Based on this report and his own follow-up inspection, the adjuster concluded that wind was responsible only for the damage to the roofs of the cottage and the main dwelling.[12] Upon receipt of the Haag report and the adjuster's opinion, USAA issued payments to the Corbans in the amounts of $39,971.91 for "losses attributed to wind damage," $16,955.38 for incurred living expenses, and $21,077 for personal property insured under a "personal articles floater."[13] Also, USAA had previously paid $5,900 for loss of valuables and refrigerated food.[14] Consequently, the Corbans were left with $1,174,022.23 in unsatisfied claimed losses.[15]

In response, the Corbans hired their own experts whose inspection established that the hurricane winds destroyed the structures prior to the arrival of the storm surge.[16] Armed with this information and their outstanding losses exceeding $1,000,000, the Corbans filed suit against USAA.[17]

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6. *Corban*, 20 So. 3d at 622.

7. *Id.* at 606.

8. *Id.*

9. *Id. See* Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957, 968–72 (2010) (distinguishing causation in insurance law from causation in torts law). In tort law, causation establishes fault or blame on the part of the tortfeasor and links that fault to the resulting loss. In insurance, the "question is not 'who is to blame and why' but merely 'what happened.' " Causation is used to determine whether "what happened" is covered under the policy contract. The question of causation asks "whether or not the 'topic' of a contractual right is going to be in play." *Id.* at 969–70.

10. *Corban*, at 606–07.

11. *Id.* at 606.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 607.

16. *Id.*

17. *Id.*

III. PROCEDURAL HISTORY

Although the Corbans' original complaint contained actions in both contract and tort, the parties agreed to bifurcate the claims.[18] Therefore, the Circuit Court of Harrison County heard the "insurance coverage/ breach of contract" claim separately from those of emotional distress, attorneys' fees, and punitive damages.[19]

In their complaint, the Corbans alleged that the water damage exclusion and the anticoncurrent cause (ACC) clause of the homeowner's policy were ambiguous as a matter of law.[20] In its answer, USAA asserted that certain damage was caused by water, and, accordingly, that damage was excluded under the specific provision in the policy.[21] Each party then filed competing "Motions for Partial Summary Judgment" which focused on the water damage exclusion and the ACC clause.[22] While the Corbans insisted that both were ambiguous and contrary to public policy, USAA argued that the policy should be strictly enforced.[23]

After a hearing on the motions, the court issued an "Order Granting Partial Summary Judgment to [USAA] and Denying Partial Summary Judgment to [the Corbans] Regarding Anticoncurrent Causation Clause and Storm Surge Issues (With Findings of Fact and Conclusions of Law)."[24] The findings of the court included: (1) storm surge, as a form of water damage, was excluded from the policy; (2) the water damage exclusion and the ACC were unambiguous; and (3) the ACC would be applied according to the Fifth Circuit Court of Appeals interpretation, thereby denying coverage for the Corbans' losses caused by any combination of wind and water, whether concurrently or sequentially.[25]

Upon entry of the order of the Circuit Court of Harrison County, the Corbans filed a petition for interlocutory appeal with the Mississippi Supreme Court.[26] After granting the petition and restating the issues,[27] the Mississippi Supreme Court, sitting en banc, heard the arguments and issued an opinion written by Justice Randolph, which carefully construed the insurance policy contract.[28]

The court's analysis resulted in the following conclusions: (1) the court held that "storm surge" was a form of water damage and, therefore, was excluded from coverage under the policy; (2) the court rejected the Fifth Circuit's interpretation of the ACC clause and declared it inapplicable; and (3) because issues of material fact existed, the court established the proper

18. *Id.*
19. *Id.* at 605, 607 n.6.
20. *Id.* at 607.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 605.
25. *Id.* at 607–08.
26. *Id.* at 608.
27. *Id.*
28. *Id.* at 612–15.

burdens of proof for the parties.[29] The circuit court's order was affirmed in part, reversed in part, and remanded for further proceedings.[30]

IV. Background and History of the Law

A. *The Appropriate Rules of Construction*

It is well-settled Mississippi law that insurance policies are contracts, and, as such, should be interpreted according to the generally accepted rules of contract construction.[31] The Mississippi Supreme Court has reasoned that when two parties agree on insurance coverage, as well as the terms included in the policy contract, each party should be able to rely on the provisions contained therein and, accordingly, expect to receive the "benefit of their bargain."[32]

Following the first basic rule of contract construction, the unambiguous words contained in an insurance policy must be read and applied according to their plain meaning.[33] Reasoning that the language of the contract expresses the objective intent of the parties, an application of the plain meaning rule yields an accurate and equitable result.[34] Interpretation by the court is necessary only if the words or provisions of the policy are ambiguous.[35] Furthermore, any ambiguities should be resolved in a manner which gives the contract the most reasonable and equitable terms for the parties involved.[36]

Another basic rule of contract construction compels the court to consider the policy as a whole, reading the provisions all together and attempting to give meaning to each in relation to the others.[37] If ambiguities exist, the court must then interpret the policy "liberally in favor of the insured, especially when interpreting exceptions and limitations."[38] The Mississippi Supreme Court referred to this as the "contra-insurer rule" which was based on the basic contract "doctrine of *omnia praesumuntur contra proferentem*, literally meaning 'all things are presumed against the offeror.' "[39]

In order to decide whether interpretation is necessary, the court must first determine whether or not an ambiguity exists in the policy.[40] In *United States Fidelity & Guaranty Co. of Mississippi v. Martin*, the Mississippi Supreme Court stated that an ambiguity does not exist simply because

29. *Id.* at 619–20.
30. *Id.* at 620.
31. Noxubee Cnty. Sch. Dist. v. United Nat'l Ins. Co., 883 So. 2d 1159, 1166 (Miss. 2004).
32. *Id.*
33. *Id.* at 1165.
34. *See* Simmons v. Bank of Miss., 593 So. 2d 40 (Miss. 1992).
35. *Noxubee Cnty.*, 883 So. 2d at 1165.
36. Frazier v. Ne. Miss. Shopping Ctr., Inc., 458 So. 2d 1051, 1054 (Miss. 1984).
37. J & W Foods Corp. v. State Farm, 723 So. 2d 550, 552 (Miss. 1998).
38. *Id.*
39. *Id.*
40. *But see* Knutsen, *supra* note 9, at 967 (asserting that most courts see insurance contracts as contracts of adhesion and, therefore, attempt to correct the imbalance in contracting power by construing policies as against the insurer even without finding an ambiguity).

the two parties disagree on the meaning of the policy language.[41] Rather, an ambiguity exists because "the policy can be logically interpreted in two or more ways, where one logical interpretation provides for coverage."[42] The court held that because the provision in the policy was indeed ambiguous, as it did not address whether overflowing sewage water fit within the water damage exclusion, the contra-insurer rule required coverage.[43]

Another occasion for ambiguity exists when two clauses or provisions in an insurance policy are at odds. When a court must determine "whether these two clauses of the policy can stand together; and, if they are so inconsistent they cannot . . . , which one must go down," then the issue is ambiguity.[44] Because the property insurance policy in *Southern Home v. Insurance Co. v. Wall* contained two provisions, one that allowed recovery and one that denied coverage of destroyed merchandise, the court determined that the policy was ambiguous.[45] Consequently, the clause that offered coverage, the favorable outcome to the insured, prevailed.[46]

B. "Loss" as a Term in an Insurance Policy

Because the interpretation of an insurance policy ultimately determines whether coverage exists for claimed losses, the term "loss" is central to any analysis. An insured party sustains a "loss" when damage results from a covered event or risk.[47] Insurance benefits vest at the time the loss occurs.[48] Furthermore, once a covered peril causes loss and the benefits vest, they cannot be divested.[49] This concept is central to cases in which distinguishable losses result from separate events: once the first loss occurs and the benefits from that loss vest, a second event does not act to divest the insured of the benefits of the first loss.[50] In major catastrophes, such as hurricanes, property may sustain "damage" that is actually a combination of multiple losses caused by separate perils.[51]

C. Mississippi's "Efficient Proximate Cause" Doctrine

When an insurance policy does not contain a contravening clause, Mississippi's default rule on losses caused by concurrent perils is the "efficient proximate cause" rule.[52] As stated by the Mississippi Supreme Court, "the

41. 998 So. 2d 956, 963 (Miss. 2009).
42. *Id.*
43. *Id.*
44. S. Homes Ins. Co. v. Wall, 127 So. 298, 299 (Miss. 1930).
45. *Id.* at 299–300.
46. *Id.* at 300.
47. Bland v. Bland, 629 So. 2d 582, 589 (Miss. 1993).
48. *Id.*
49. *Id.*
50. *Id.*
51. *See* Parts V.B.2, VI.B.1 (discussing the difference in "loss" and "damage").
52. Evana Plantation, Inc. v. Yorkshire Ins. Co., 58 So. 2d 797, 798 (Miss. 1952). *See* Knutsen, *supra* note 9, at 962 (defining concurrent causation in insurance as a loss "brought about by two or more potential causes), at 974–75 (discussing the efficient proximate cause doctrine as causing "haphazard, unpredictable jurisprudence surrounding concurrent causation in insurance" because the choice of

general rule is that, if the cause designated in the policy is the dominant and efficient cause of the loss the right of the insurer to recover will not be defeated by the fact that there were contributing causes."[53] This rule established the proposition that if a single, distinguishable loss was caused partially by a covered peril and partially by an excluded peril, the insured could recover if the covered peril was the "efficient proximate cause" of the loss.[54]

Application of this rule involved a determination not only of all possible contributing causes of the loss but also whether those causes were covered or uncovered, proximate or remote, significant or trivial.[55] When faced with a loss caused by multiple perils, the "loss certainly will be covered as long as a covered cause or peril contributes significantly, as opposed to trivially, to the result."[56] While an important doctrine in Mississippi insurance law, this default rule did not apply, however, to many Hurricane Camille cases in which separate perils caused distinguishable losses.[57]

D. Hurricane Katrina Cases Decided in Federal Courts

1. *Leonard v. Nationwide Mutual Insurance Co.*[58]

The Leonards' home was damaged by wind and storm surge caused by Hurricane Katrina, and Nationwide denied coverage for most of their claim due to the ACC clause contained in the water damage exclusion of their policy.[59] The District Court for the Southern District of Mississippi held that the ACC clause was ambiguous and, consequently, the insurance policy at issue should provide coverage for losses caused by wind, which were separate from losses attributed to water and/or storm surge.[60] In reaching

a "dominant cause . . . invites equity-based 'justice' " concepts to affect the result. The inconsistent results of litigation in which the doctrine is applied cause unpredictable coverage for insureds and unpredictable ability to exclude coverage for insurers.).

53. *Evana Plantation Inc.*, 58 So. 2d at 798. *See* Lavitt, *supra* note 5, at 16 (discussing the adoption of some variant of the doctrine by 29 or more states and also discussing the "economic inefficiency" of the doctrine in the "conflicting and confusing state precedents" produced by application of the doctrine).

54. *Evana Plantation Inc.*, 58 So. 2d at 798.

55. JEFFREY JACKSON & MARY MILLER, ENCYCLOPEDIA OF MISSISSIPPI LAW § 40:106 (2010).

56. *Id.*

57. Lititz Mut. Ins. Co. v. Boatner, 254 So. 2d 765, 767 (Miss. 1971). Many cases to determine insurance coverage following Hurricane Camille did not utilize the efficient proximate cause doctrine. Rather testimony and evidence supported findings that wind and water acted separately to cause distinguishable losses. Recovery was based upon these separate losses. While courts often "premised recovery . . . on the application of the efficient proximate cause rule, in actuality . . . , the court did little more than uphold jury findings that the damages suffered by policyholders were caused," by wind as an independent cause of a separate loss. Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419,432–33 (5th Cir. 2007). *See* Liberty Universal Ins. Co. v. Hall, 289 So. 2d 683, 684 (Miss. 1972); Lititz Mut. Ins. Co. v. Buckley, 261 So. 2d 492, 295 (Miss. 1972); Grace v. Lititz Mut. Ins. Co., 257 So. 2d 217, 224 (Miss. 1972); Commercial Union Ins. Co. v. Byrne, 248 So. 2d 765, 766 (Miss. 1971); *see* Lavitt, *supra* note 5, at 18–19 (discussing the treatment of Hurricane Camille cases by the Mississippi Supreme Court as being fact based rather than dependent on a strict application of any rule of law).

58. 499 F.3d 419 (5th Cir. 2007).

59. *Id.* at 423–24.

60. Leonard v. Nationwide Mut. Ins. Co., 438 F. Supp. 2d 684, 693–94 (S.D. Miss. 2006)).

this conclusion, the district court stated, "[u]nder applicable Mississippi law, in a situation such as this, where the insured property sustains damage from both wind (a covered loss) and water (an excluded loss), the insured may recover that portion of the loss which he can prove to have been caused by wind."[61] In order to determine that the ACC clause was ambiguous, the court read the provision in question, as well as the policy as a whole, to conclude that the ACC clause was not in agreement with the overall terms of the policy and could not be conformed or interpreted in a manner which would allow both to stand as enforceable.[62]

On appeal, the Fifth Circuit analyzed the ACC clause at issue and held that such provisions "den[y] coverage whenever an excluded peril and a covered peril combine to *damage* a dwelling or personal property."[63] In its correction of the Southern District's faulty reasoning, the Fifth Circuit determined that insurance policies at issue in the old Hurricane Camille case law, which served as the basis for the lower court's decision, did not contain ACC clauses similar to the one at bar; rather, the doctrine of efficient proximate cause controlled in those older cases.[64] In fact, the Fifth Circuit suspected that insurance companies began to include ACC clauses in homeowner's policies in order to avoid the "efficient proximate cause" doctrine.[65] Because the Mississippi Supreme Court had not ruled on a claim involving an ACC clause, no settled Mississippi law had been established on the matter.[66] The Fifth Circuit then made an "*Erie* guess"[67] on the issue and proclaimed that "the ACC clause [was] not ambiguous" and, therefore, operated to deny coverage to the Leonards for any *damage* that resulted from "wind and water [acting] synergistically."[68] In reaching this conclusion, the Fifth Circuit did not conduct any extensive parsing of the language of the ACC clause or make any attempts to read the provision at

61. *Id.* at 695. The Southern District separates damage into distinguishable losses caused separately by wind and water.

62. *Id.*

63. *Leonard*, 499 F.3d. at 425 (emphasis added). The Fifth Circuit refers to "damage" rather than to "loss."

64. *Id.* at 433. *But see supra* note 57 (discussing the Fifth Circuit acknowledgement that efficient proximate cause did not actually apply to many holdings in Hurricane Camille cases).

65. *Id.* If insurance companies wrote ACC clauses in order to circumvent the efficient proximate cause doctrine, the ACC clause would not necessarily help the insurance companies in cases in which the doctrine was not actually applied.

66. *Id.* In order to make its determination of Mississippi law, the Fifth Circuit focused solely on the lack of case law and statutes specifically addressing the ACC clause rather than explaining how the Mississippi Supreme Court would decide the issue, what analysis the Mississippi Court would use, or why the Mississippi Court would hold differently than the Southern District. The Fifth Circuit had another alternative—one that would ensure an accurate assertion of Mississippi law on the matter; it could have certified the question to the Mississippi Supreme Court.

67. *See In re* Katrina Canal Breaches Litig., 495 F.3d 191, 206 (5th Cir. 2007). The Fifth Circuit cited *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) and explained that when sitting in diversity, federal courts must apply appropriate state substantive law. In order to determine a state's substantive law on a matter, the Fifth Circuit consulted state common law as determined by the state's highest court as well as statutory law. If no such state authority existed, the Fifth Circuit then made an "*Erie* guess" as to how the state high court would rule if faced with such issue.

68. *Leonard*, 499 F.3d at 430 (emphasis added).

issue with regards to the policy as a whole to ensure that all terms could be reconciled.[69]

After the *Leonard* holding, the Fifth Circuit heard other cases requiring the application of Mississippi law to the issue of the propriety of ACC clauses in Hurricane Katrina claims.[70] In those subsequent cases, the Fifth Circuit simply applied its "*Erie* guess" established in *Leonard* and allowed the ACC clause to defeat coverage.[71] While not mandatory authority, the Mississippi Supreme Court considers decisions of the United States Court of Appeals for the Fifth Circuit to be persuasive when considering issues on point.[72] For this reason, the Fifth Circuit's decisions in *Leonard* and other Katrina cases were important in the Mississippi Supreme Court's analysis in *Corban*.

2. *Dickinson v. Nationwide Mutual Fire Insurance Co.*[73]

Even after the Fifth Circuit's reversals in multiple Katrina cases, the Southern District did not sway from its opinion that the ACC clause should not apply to losses clearly caused by wind damage.[74] In *Dickinson*, however, the federal district court conducted a more thorough examination of the terms of the provision and a more extensive explanation of its application of the rules of contract construction.[75] Here, the court focused on the precise wording of the ACC clause, giving particular scrutiny to "loss" and "such loss."[76]

If the "loss" in the first sentence refers to the loss caused by the excluded water damage, "such loss" in the second sentence must only refer to that same specific water damage.[77] If "such loss" is also partially caused by a covered peril, the ACC clause applied to exclude "such loss."[78] However, if the wind caused losses, which were separate from "such losses" caused by the storm surge, those separate losses (even if sequential), are vested and

69. *Id.*

70. *See* Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346, 352–56 (5th Cir. 2007). As in *Leonard*, the Southern District held that the ACC was ambiguous and, therefore, inapplicable. The Fifth Circuit reversed and held that the ACC clause was unambiguous and operated to deny coverage for damage caused by wind as well as water. According to its "*Erie* guess," the ACC clause was applicable under Mississippi law.

71. *Id.*

72. Bullard v. Guardian Life Ins. Co. of Am., 941 So. 2d 812, 819 n.1 (Miss. 2006).

73. 2008 WL 1913957 (S.D. Miss. Apr. 25, 2008).

74. *Id.* at *3.

75. *Id.* This was basically the same result that the Fifth Circuit reversed in *Leonard*. In *Dickinson*, however, the Southern District did not hold the ACC clause ambiguous. Rather, the court determined that the clause did not apply because the losses caused by wind and water were separate and distinguishable. This reasoning is very similar to Mississippi cases after Hurricane Camille. Because the efficient proximate cause doctrine did not apply, the ACC clause also did not operate to exclude the entire claim. Rather than making or applying an "*Erie* guess," the Southern District was attempting to determine Mississippi law based on Mississippi precedent. Because the efficient proximate cause doctrine did not apply, the lack of ACC clauses in the Camille cases did not affect Mississippi law.

76. *Id.* at *2–3.

77. *Id.* at *2.

78. *Id.*

cannot be excluded under the ACC clause.[79] The ACC clause only operated to exclude coverage if the wind and water acted to cause indistinguishable loss.[80] This holding set the stage for the Mississippi Supreme Court's examination of the ACC clause in *Corban*.

E. Who Bears the Burden?

When causes of action arise from disputes over insurance coverage, the question of who bears the burden of proof is outcome determinative and, therefore, pivotal to the case. An all-risk policy employs a "mechanism of burden-shifting as to which party bears the risk of . . . loss."[81] Initially, the insured party bears the burden of proving that a loss occurred.[82] If the insurance company plans to raise the affirmative defense that the loss was caused by an excluded peril, then the burden of proof shifts to the insurer to prove that exclusion.[83] Consequently, "[u]nder this burden-shifting mechanism, the insured does not need to prove the cause of the loss."[84]

Both the Mississippi Supreme Court and the Fifth Circuit have followed this burden shifting procedure in cases involving coverage disputes under all-risk policies.[85] The Fifth Circuit explained that the purpose of all-risk insurance policies is to "protect[ ] the insured in those cases where difficulties of logical explanation or some mystery surround the (loss or damage to) property."[86] Accordingly, the insured should not have to bear the burden of proving the exact cause of the loss.[87] If the insurance company plans to dispute coverage, the burden to show that the loss was caused by an excluded peril falls upon the insurer.[88]

V. THE INSTANT CASE

After granting the Corbans' petition for interlocutory appeal, the Mississippi Supreme Court restated and limited the issues for review: (1) whether "storm surge" was included in the "water damage" exclusion; (2) whether the ACC clause applied to the case at bar; and (3) which party bore the burden of proof.[89] The court then determined that its analysis should consist of two steps—construing the insurance policy and then applying the policy to the specific facts of the *Corban* case.[90] Because "the

79. *Id.* at *3–4.

80. *Id.* at *3.

81. STEVEN PLITT ET AL., COUCH ON INSURANCE § 101:7 (3d ed. 2011).

82. *Id.*

83. *Id.*

84. *Id.*

85. *See* Lunday v. Lititz Mut. Ins. Co., 276 So. 2d 696, 698 (Miss. 1973); Morrison Grain Co. v. Utica Mut. Ins. Co., 632 F.2d 424, 429 (5th Cir. 1980).

86. *Morrison*, 632 F.2d at 430.

87. *Id.*

88. *Id.*

89. Corban v. United Servs. Auto Ass'n., 20 So. 3d 601, 608 (Miss. 2009).

90. *Id.* at 608–09.

interpretation of an insurance policy is a question of law, not one of fact,"[91] a de novo review was necessary.[92]

A. *The Rules of Contract Construction*

In order to begin its analysis, the court first determined the proper method by which to construe the policy.[93] Prior Mississippi case law defined insurance policies as contracts, and therefore, the interpretation of those policies required utilization of the basic rules of contract construction.[94] Accordingly, the court considered the contract as a complete document, determining the meaning of the actual language contained in each provision, as well as the provisions in relation to one another in order to "reach a reasonable overall result."[95]

The court's focus was the objective interpretation of the contract's plain language rather than the parties' unexpressed, subjective intent.[96] Furthermore, if the policy's plain language was clear and unambiguous, the provisions would simply be applied as written.[97] If ambiguities were found, however, the unclear provisions would necessarily be construed in favor of the non-drafting party according to contract law.[98] The court defined ambiguities as terms that yield more than one reasonable meaning; a simple disagreement over coverage did not constitute ambiguity in the policy.[99]

B. *Applying the Rules to the Policy*

Once the proper method of analysis was identified, the court next began the actual construction of the policy in question.[100] The Corbans' policy with USAA was an all-risk policy.[101] According to USAA, this meant, "all risks to the structures [were] covered, other than those risks specifically excluded from coverage."[102] The policy contained a provision excluding "water damage," and this exclusion also contained the ACC clause currently contested.[103] Both parties agreed that while damage caused by wind was covered under the policy, the damage caused by water was excluded.[104] Because the losses resulting from Hurricane Katrina consisted of both wind

91. *Id.* at 609 (quoting Noxubee Cnty. Sch. Dist. v. United Nat'l Ins. Co., 883 So. 2d 1159, 1165 (Miss. 2004)).
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 610.
101. *Id.* at 609.
102. *Id.* at 610.
103. *Id.*
104. *Id.*

and water damage, the water damage exclusion and the ACC clause were at issue in the determination of coverage.[105]

1. The Issue of Storm Surge

The court first considered the issue of "storm surge" as it related to the "water damage" exclusion.[106] The Corbans claimed that "storm surge" was not water damage because the policy did not specifically list "storm surge" among the various meanings included in the water damage exclusion.[107] Accordingly, the court conducted an extensive examination of storm surge.[108] As persuasive authority, the court considered the cases of *Leonard* and *Tuepker*, as well as other Hurricane Katrina litigation, in which the Southern District and the Fifth Circuit both determined that storm surge was included in the "water damage" exclusions of various insurance policies.[109] The Mississippi Supreme Court affirmed the lower "court's ruling that 'storm surge' is contained unambiguously within the water damage exclusion . . . , and no other logical interpretation exists."[110]

2. The Issue of the ACC Clause

The court then considered the second issue—whether the ACC clause in the "water exclusion" applied to the Corbans' claim.[111] Before beginning its own analysis, the court referred to the lower court's examination of the ACC clause.[112]

a. The Harrison County Circuit Court's Analysis

The Harrison County Circuit Court determined that the logical reading of the ACC clause was an unambiguous exclusion of losses caused *only* by water damage, regardless of whether that water damage was in combination with or in sequence with other causes.[113] When the circuit court read the provision in a "plain, common-sense" manner, the way in which "average citizens are expected to read and understand," it concluded that the ACC clause was unambiguous and intended to only exclude the loss caused by water damage.[114]

In an analysis very similar to that of the Southern District in *Dickinson*, the Harrison County Circuit Court paid particular attention to the word "loss" in the first sentence of the ACC clause and the phrase "such loss" in the second sentence.[115] The court reasoned:

105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 610–11.
110. *Id.* at 611 (citing United States Fid. & Guar. Co. v. Martin, 998 So. 2d 956, 963 (Miss. 2008)).
111. *Id.*
112. *Id.*
113. *Id.* at 611–12 (emphasis added).
114. *Id.* at 611.
115. *Id.* at 611–12.

> The term 'such loss' can only refer to the loss caused by water damage mentioned in the first sentence of the exclusion. It is that loss and that loss only that is excluded by the plain language of the provision. . . . This simple, basic interpretation of the language used and sentence structure used bars coverage for water damage and only the water damage, whether occurring alone or in any order with another cause.[116]

If losses were caused by perils separate and distinct from "such loss" caused by water, those separate losses were compensable—only the water damage was excluded.[117]

This interpretation of the ACC clause favored the Corbans; it allowed coverage of wind damage while excluding only water damage.[118] As long as the two forces were acting individually, wind damage, whether occurring simultaneously or in sequence with water, would be covered under the policy.[119] Rather than applying its own construction of the ACC clause, however, the Harrison County court deferred to the persuasive holdings of the Fifth Circuit in *Leonard* and *Tuepker*.[120] In those cases, the Fifth Circuit applied similar ACC clauses to claims resulting from Hurricane Katrina damage, thereby denying coverage to any damage resulting from wind and water acting "synergistically" to cause the same damage.[121]

b. The Mississippi Supreme Court Construes the ACC Clause

Next, the court began its own analysis of the ACC clause by stating the exact words of the provision, emphasizing the words to be scrutinized in its construction:

> 1. We do not insure for *loss* caused directly or indirectly by any of the following. Such *loss* is *excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.*[122]

The words "loss," "concurrently," and "in any sequence" were the significant words in the exclusion and accompanying ACC clause, and consequently, the court analyzed each according to its plain meaning.[123] Because the policy did not specifically define these words, the court followed the generally accepted rules of contract construction: (1) consider how the words were utilized elsewhere in the policy; and (2) determine

116. *Id.*
117. *Id.* at 612.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 612–13.

their ordinary and popular meaning.[124] The court accomplished this by examining the policy provisions and by looking in Webster's II New College Dictionary, Black's Law Dictionary, as well as other sources.[125]

i. The "Loss"

The court reasoned that "loss" occurs at the point in time when the property sustains damage or destruction.[126] Additionally, the right to recover attaches when the loss is actually incurred.[127] Once loss occurs due to one type of damage, whether included or excluded, that loss is not changed by any subsequent damage.[128] Therefore, once a loss is caused by an included damage, that loss cannot be excluded by subsequent damage.[129] The court determined "[t]he insured's right to be indemnified for a covered loss vests at time of loss. Once the duty to indemnify arises, it cannot be extinguished by a successive cause or event."[130] Hence, the policy allowed recovery for all "direct, physical loss" to the property unless such loss was covered by an enumerated exclusion.[131]

The court also explained the difference between the terms "damage" (as used by the Fifth Circuit in *Leonard*) and "loss" as terms in insurance law.[132] The court quoted APPLEMAN ON INSURANCE and stated, "Loss to property can consist of *many losses* . . . and 'loss' need *not* refer *only* to the *totality of the damage* and in fact *should not when different forces have caused different damage*."[133] The losses caused by wind and water should be segregated and not considered together as a single instance of property damage.[134]

ii. "Concurrently"

Looking next at "concurrently," the court considered whether perils that coexist, such as wind and water in a hurricane, were necessarily excluded under the ACC clause.[135] Upon consideration of the plain meaning derived from the various definitions, the court decided that events may only be "concurrent" when they "act in conjunction, as an indivisible force, occurring at the same time, to cause direct physical damage resulting in loss."[136]

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124. *Id.*
125. *Id.* at 613.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* (citing Bland v. Bland, 629 So. 2d 582, 589 (Miss. 1993)).
131. *Id.* at 614.
132. *Id.*
133. *Id.* (citing APPLEMAN ON INSURANCE § 192.03[H] (2009) (emphasis added by the Court).
134. *Id.*
135. *Id.* (The Court first concluded that the policy did not, as the Corbans claimed, specifically cover hurricane damage. The policy addressed the separate damages caused by a hurricane, including wind while excluding water.).
136. *Id.*

Applying the definition to the case, the losses sustained by the Corbans were not caused by the forces of wind and water acting "concurrently" or as an indivisible force.[137] Rather, the wind and the water constituted two separate forces acting in sequence with one another causing distinct losses.[138] Because the wind and water did not act "contemporaneously and in conjunction," they could not be "concurrent" causes under the ACC clause.[139]

iii. "In Any Sequence" Is Ambiguous

The court then considered the phrase "in any sequence" to mean "sequentially" for the purpose of determining the plain meaning.[140] This wording of the ACC clause implied that a covered loss, which vested at the time of occurrence, could then be divested by an excluded loss, which occurred in sequence.[141] The court determined that the "in any sequence" phrasing operated to contradict the plain meaning of "loss" as well as other policy provisions that establish when losses vest.[142] Because of this conflict within the language and provisions of the policy, the court determined that an ambiguity existed and, therefore, the provision favoring the insured should be enforced.[143] In this particular case, the ACC clause's "in any sequence" language was not enforced because it would operate to cancel a covered loss.[144]

iv. The Mississippi Supreme Court's Holding on the ACC Clause Issue

The court's analysis concluded that the lower court's construction of the water damage exclusion and the accompanying ACC clause was proper—loss from *water damage* could be excluded "regardless of any other cause or event [wind damage] contributing concurrently or in any sequence to the loss [from water damage]."[145] Hence, the policy excluded only water damage unless the water and wind acted "concurrently" as defined by the court as "contemporaneously and in conjunction."[146] Because the wind and water in a hurricane usually act as separate and distinct forces causing separate damages, the policy's ACC clause cannot allow a covered loss caused by wind damage to become an excluded loss when followed sequentially by water damage.[147]

137. *Id.*
138. *Id.* at 614–15.
139. *Id.* at 615.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 615–16.
144. *Id.* at 616.
145. *Id.* (emphasis added).
146. *Id.*
147. *Id.*

The court then cited *Dickinson*, in which the Southern District found that wind damage was covered by a Nationwide policy whereas any water damage was excluded.[148] The *Dickinson* court held that "the anticoncurrent cause provision is not applicable and does not come into play because each force causes its own separate damage independent of the damage caused by the other even when the same item of property is damaged by both forces acting separately and sequentially."[149] Accordingly, the Mississippi Supreme Court held that the ACC clause did not apply in this case.[150] The Corbans' losses attributed to wind were covered under their USAA policy, while those damages caused by water or "storm surge" were excluded.[151]

In so holding, the court "respectfully rejected" the reasoning of the Fifth Circuit as expressed in the *Tuepker* and *Leonard* opinions.[152] The Mississippi Supreme Court again emphasized the correct construction of the water damage exclusion and the ACC clause by the lower court and its error in rejecting its own interpretation in favor of the "Fifth Circuit's '*Erie* guess' regarding its application."[153]

c. *The Burden of Proof Issue*

Because a finder of fact must determine which losses were caused by wind and which caused by water, the court next determined who bore the burden of proof.[154] Initially, the insureds had to prove that damages actually occurred.[155] Then, if the insurer presented the affirmative defense that the losses were caused by an excluded peril, the insurer carried the burden to prove by a preponderance of the evidence that the excluded peril was indeed the cause of the loss.[156]

The Mississippi Supreme Court affirmed the Harrison County Circuit Court's holding on the issue of "storm surge" but reversed on the applicability of the ACC clause to the Corbans' claim.[157] The case was remanded with the proper burden of proof established for the finder of fact.[158]

VI. ANALYSIS

The *Corban* opinion is significant for multiple reasons. Not only did the Mississippi Supreme Court decide the contested issues in the Corbans' dispute with USAA, it also corrected the Fifth Circuit's "*Erie* guess" and established new Mississippi law. Perhaps more significant than the holding

148. *Id.*
149. *Id.* at 617.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 618.
154. *Id.*
155. *Id.*
156. *Id.* at 619.
157. *Id.*
158. *Id.* at 619–20.

itself, the implications of this new law are substantial, and many questions remain in the wake of the opinion.

A. *The Mississippi Supreme Court Is in Harmony with Other Courts Regarding Storm Surge*

Although the Corbans claimed that storm surge losses were covered, the Mississippi Supreme Court easily determined that the water damage exclusion applied to storm surge.[159] The fact that storm surge was not specifically enumerated in the water damage exclusion did not automatically provide coverage.[160] Without extensive parsing of the provision or resorting to dictionaries, a simple application of the plain meaning rule determined that the term "storm surge" was unambiguous and easily included in the water damage exclusion.[161] Also in its analysis, the court referred to previous Mississippi cases holding that storm surge was an unambiguous term, included in water damage exclusions even if not specifically enumerated.[162]

This was a perfectly logical outcome. While the words "storm surge" were not specifically stated in the policy language, the largely agreed upon definition of storm surge was synonymous with "water damage." To allow coverage here would defeat USAA's clear intention of exclusion. This outcome also demonstrates that the Mississippi Supreme Court did not disagree with the Fifth Circuit on all issues of the Katrina cases. The Mississippi Supreme Court was not merely attempting to be contrary; rather, it had a legitimate disagreement with the Fifth Circuit's holding concerning the ACC clause.

B. *The Court Interprets the ACC Clause and Formulates Mississippi Law*

While the Mississippi Supreme Court disagreed with the Fifth Circuit over the applicability of the ACC clause, the opinion was certainly not unique. Both the Harrison County Circuit Court and the Southern District had already held that the ACC clause did not apply to these types of losses; however, those courts used different analyses and explanations to arrive at the same ultimate conclusion.[163] The Southern District's analysis in *Dickinson* was particularly important; both the Harrison County Circuit Court

159. *Id.* at 610–11. In reaching this decision, the Court considered the holdings of the Fifth Circuit in *Leonard* and *Tuepker*. These holding were merely affirmations of the Southern District's careful determination that storm surge was a form of water damage unique to hurricanes.

160. *Id.* The Harrison County Circuit Court correctly ascertained that the very definition of storm surge—"ocean or lake water being pushed by or affected by wind causing the water to rise and move toward or onto shore"—made it fit into the water damage exclusion, even if it was not listed therein.

161. *Id.*

162. *Id.*

163. *See supra* Parts IV.D.2, V.B.2 (discussing the examination of ACC clauses by the Southern District and the Harrison County Circuit Court).

and the Mississippi Supreme Court expounded upon its discussion of "loss" and "such loss" in their respective *Corban* opinions.[164]

Because this approach had been taken by both the federal district court and the lower court, the *Corban* decision was not a novel or unjustified rebuke of the Fifth Circuit. Rather, the opinion demonstrated that the Mississippi Supreme Court legitimately disagreed with the Fifth Circuit's "*Erie* guess" and took the opportunity to establish Mississippi case law to displace it. Not only did the court disagree with the Fifth Circuit, it explained in great detail how it disagreed.[165] To that end, the Mississippi Supreme Court combined methods employed by other courts with its own careful analysis to craft a thorough explanation of its opinion.[166]

Rather than simply holding the ACC clause ambiguous and, therefore, inapplicable, the Mississippi Supreme Court conducted an extensive examination of the wording of the provision.[167] In order to establish the plain meaning of the terms, the court consulted legal and layman dictionaries as well as the definitions contained in the policy.[168] Furthermore, to determine whether ambiguities existed, the provisions of the policy were read as a whole.[169] By conducting such an extensive examination, the Mississippi Supreme Court did not merely proclaim Mississippi law; it provided an explanation.

1. The Importance of the Distinction Between "Loss" and "Damage"

In an attempt to justify its opposition to the Fifth Circuit, the court explained the difference between "loss" (the term contained in the ACC clause) and the term "damage" (used by the Fifth Circuit).[170] Once a property sustains a loss caused by wind, that vested loss cannot subsequently be converted to a different loss by water.[171] Even though the property sustains "damage" caused by both wind and water, if the two forces are acting at two different times or as two separate forces, then two distinct losses vest at the time each occurs.[172] Furthermore, the loss caused by the covered peril must be indemnified; it cannot be cancelled out by any subsequent loss, even if that loss is caused by an excluded peril.[173]

This means that a loss caused by wind cannot be converted to a loss caused by water simply because the water arrives after or separately from the wind. For the ACC clause to apply, "the loss," as referenced in the language of the clause, must be a single loss caused by the excluded peril of

164. *See supra* Parts IV.D.2, V.B.2.

165. *See supra* Part V.B.2 (detailing the extensive analysis of the ACC clause by the Mississippi Supreme Court).

166. *See supra* Part V.B.2.

167. *See supra* Part V.B.2.

168. *See supra* Part V.B.2.

169. *See supra* Part V.B.2.

170. Corban v. United Servs. Auto Ass'n, 20 So. 3d 601, 612–14 (Miss. 2009).

171. *Id.*

172. *Id.*

173. *See supra* Part IV.B (discussing the significance of the definition of "loss" in insurance law).

water in combination with another peril that would normally be covered under the policy.[174] A catastrophic event, such as a hurricane, is capable of major property "damage," but that damage may be a combination of multiple separate "losses" caused by different perils, some of which are covered while others are excluded.[175] Thus, while the ultimate "damage" may be difficult to separate into individual losses, according to the *Corban* opinion, the determination must be made in order to indemnify the policy-holder adequately.

While this distinction between loss and damage is clearly important in the court's analysis, the actual segregation of property damage into distinct losses will be difficult.[176] Compounding the problem, the lack of witnesses makes the separation of losses even more troublesome. When the threat of a hurricane forces the residents to evacuate, the property sustains the damage while no one is present to see how it actually occurs. Once the homeowner returns to find the home damaged or destroyed, this determination must be made during the extremely stressful circumstances found in the aftermath of a hurricane's devastating effects.

2. The Definition of "Concurrently" Constricts the Application of the ACC Clause

While the *Dickinson* court's analysis centered on the meaning of loss, the Mississippi Supreme Court carried its examination of the language and terms of the provision much further. Next, in its scrutiny of the term "concurrently," the court stated that two perils acting "as an indivisible force, occurring at the same time, to cause direct physical damage resulting in loss" would be concurrent causes to which the ACC clause would apply.[177] A single *loss*, concurrently caused by two "contemporaneously" occurring perils, would be excluded by the ACC clause.[178] The court's emphasis on the convergence of the two causes at exactly the same time is a very restrictive definition of concurrent. Using this definition, storm surge may provide an example of a truly concurrent cause. It is the unique combination of the forces of wind and water driven ashore during a hurricane; the two perils cannot be distinguished or separated, and they cause an indivisible loss.[179]

Also important in its explanation of "concurrently," the court explains when the ACC clause *does* apply. If a single loss is truly caused by concurrent perils, then the ACC clause does indeed act to exclude the loss from coverage.[180] The court did not declare the entire ACC clause ambiguous, nor it did hold that the ACC clause is unconscionable or in *all* instances

174. *Corban*, 20 So. 3d at 613–14.

175. *Id.* at 616.

176. *See* Knutsen, *supra* note 9, at 998–1008 (discussing the difficulty of differentiating losses caused during a catastrophic event).

177. *Corban*, 20 So. 3d. at 614.

178. *Id.* at 614–15.

179. *See supra* notes 159, 160 (describing and defining storm surge).

180. *Corban*, 20 So. 3d at 614–15.

inapplicable. Although finding two perils acting concurrently, by its restrictive definition, may prove difficult, the court made certain that a loss sustained due to concurrent causes, one of which is excluded in the policy, will not be covered under the ACC clause.[181]

By allowing the "concurrently" portion of the ACC clause to avoid coverage of a single loss caused contemporaneously by two or more perils, the court does allow the ACC clause to counteract the efficient proximate cause doctrine. By not striking the entire clause or declaring it ambiguous in its entirety, the Mississippi Supreme Court allows the insurance company to contract around the Mississippi default rule.[182] In instances where an application of efficient proximate cause would determine that a covered peril was the dominant cause of a single loss and allow coverage, the ACC clause, if present in the policy, would defeat such coverage.

Here again, the importance of the court's distinction between "loss" and "damage" becomes important. When forced to examine the individual "losses" which combine to cause the property "damage" in a hurricane, the efficient proximate cause rule and the insurance company's attempt to avoid that rule become less applicable. According to the court, the "damage" cannot be considered in its entirety, but rather, it must be separated into "losses."[183] This greatly decreases the effect of the ACC clause. By emphasizing individual losses, the court allows a portion of the ACC clause to remain in the policy but greatly reduces its application. This decision leads to further questions: Does this really help the insurance company in its attempt to reduce its correlated risk and exclude the catastrophic damage caused by hurricanes? By constricting the application so severely, does the court in effect take the insurance company's freedom to contract without saying so?

3. "In any sequence"—Ambiguous or Against Public Policy?

Finally, the Mississippi Supreme Court examined "in any sequence" and determined that the phrase is synonymous with the word "sequentially."[184] After examining several other provisions contained within the policy, the court asserted that an ambiguity existed, and, therefore, the phrase must be construed in favor of the insured.[185] The conflicting policy provisions stated that any sustained loss was vested at the time the loss occurred; moreover, the property's value was to be determined at the time

181. *Id.*

182. *See supra* Part V.C (discussing the efficient proximate cause doctrine in Mississippi). *See* Knutsen, *supra* note 9, at 974–77, 982 (discussing the inefficiency and unpredictability of the efficient proximate cause doctrine), at 995–97 (discussing that while insurance companies attempt to overcome the unpredictability of the efficient proximate cause doctrine by including ACC clauses in policies, the unpredictable enforcement of the clauses by the courts makes this an inefficient solution to the problem).

183. *See supra* Part V.B.2 (discussing the Court's distinction between "damage" and "loss").

184. *Id.* (explaining the definition of "in any sequence").

185. *Id.*

of loss or immediately prior to the loss.[186] In order to enforce these provisions, no sustained, vested loss can be divested by a sequentially occurring cause or peril.[187] In this particular case, no vested loss caused by a covered peril—wind—can be subsequently excluded simply because the same property suffers a sequential loss caused by water. The initial loss still exists and must be covered, no matter what happens in sequence to it.

In this portion of the analysis, the Mississippi Supreme Court strays from the Harrison County court and from the Southern District's *Dickinson* opinion. Neither court struck down any portion of the ACC clause as ambiguous; rather, each court found that the ACC clause did not apply due to two separate perils causing distinguishable losses.[188] Here, by holding that the "in any sequence" portion of the ACC clause was indeed ambiguous, the Mississippi Supreme Court struck down the portion of the provision most beneficial to the insurer while upholding the portion most favorable to the insured.[189] Neither the lower court nor the Southern District had recognized that the "in any sequence" language could not be reconciled with the concept of a single loss referenced in the ACC clause.[190] If a covered peril caused a loss, a sequentially occurring (excluded) peril could not extinguish that existing loss. The two concepts of "vested loss" and "in any sequence" could not be reconciled, and, therefore, an ambiguity did indeed exist.

If, however, the insurance company intended for the definition of "loss" to be more akin to the Mississippi Supreme Court's idea of "damage," the use of "in any sequence" in the clause could be reconciled within the policy. The holding of "in any sequence" as ambiguous would defeat the insurance company's attempt to exclude coverage for sequential causes of a more broadly defined "loss." The court's narrow definition of loss and its striking of the "in any sequence" phrasing seem to indicate an unwillingness to allow insurers to completely contract around sequential losses, which are characteristically present in property damage caused by a hurricane.[191] Rather than an examination of terms to determine ambiguity, the *Corban* opinion *may* be asserting new policy—Mississippi's refusal to allow

186. Corban v. United Servs. Auto Ass'n, 20 So. 3d 601, 615 (Miss. 2009).

187. *Id.* at 615–16.

188. *See supra* Parts IV.D.2, V.B.2 (discussing the analysis of the ACC clause by the Southern District and the Harrison County Circuit Court).

189. "In any sequence" is potentially beneficial to the insurer because a court could interpret it to allow coverage for "damage" caused by wind acting first and water then acting "sequentially" on the same property. Also, because it allows for different interpretations, it is more difficult to apply with uniformity. "Concurrently" is favorable to the insured, due to the Court's narrow definition, leading to a limited application to exclude coverage. The Court's definition is easy to understand and, consequently, a more uniform application is possible.

190. *See supra* Parts IV.D.2, V.B.2 (discussing the analysis of the ACC clause by the Southern District and the Harrison County Circuit Court).

191. *See* Lavitt, *supra* note 5, at 1–7 (discussing the natural combination and sequence of losses in catastrophic events such as hurricanes); *see* Knutsen, *supra* note 9, at 1001–06 (discussing the difficulties in determining causation in losses caused by perils occurring in sequence).

insurance companies to contract around sequential causation.[192] If the insurance industry does not have the freedom to contract around certain risks, insurers may feel the need to leave the market rather than be forced to insure risks that they intend to exclude.[193]

Because of the unique nature of a hurricane, in which the winds may arrive days before the storm surge and consequent flooding, the Mississippi Supreme Court tailored its opinion to assure that the ACC clause did not apply in such circumstances of sequential losses. The holding provides that insurance companies cannot define a hurricane as a single event which causes indivisible "hurricane losses" due to wind and water acting in sequence.[194] The winds and storm surge did not occur concurrently, according to the court's definition.[195] By holding "in any sequence" ambiguous, any argument by an insurer that a loss was caused by wind and water acting sequentially is precluded.[196] The hurricane winds caused a loss that vested prior to the arrival of the storm surge. Any subsequent loss caused by that storm surge was excluded due to the water damage exclusion provision, but the ACC clause could not serve as a mechanism to divest the Corbans' of the previously vested losses due to wind.

4. Implications of the *Corban* Holding on the ACC Clause

By conducting the extensive analysis of the terms of the ACC clause in question, as well as a thorough reading of the policy as a whole, the court took the time and effort necessary to explain its conclusion. The Mississippi Supreme Court did not merely disagree with the Fifth Circuit's "*Erie* guess," it provided the reasoning behind its disagreement. The ACC clause was not simply declared ambiguous or inapplicable as a whole; rather, the court explained when it could operate to exclude losses caused by truly concurrent causes and what portion of the provision was subject to divergent meanings and, consequently, ambiguous.

Whether its extensive analysis and narrow definitions are essentially a statement by the court that Mississippi public policy will not allow freedom of contract for the insurance industry still looms for the future. If insurance companies respond to this opinion with new provisions and broader definitions of terms within the policy designed to exclude the types of sequential losses caused by hurricanes, the court will once again be required to settle

192. *See* JEFFREY JACKSON, MISSISSIPPI INSURANCE LAW AND PRACTICE § 15:19 (2010) (discussing the implications of *Corban* and the possibility that the opinion may be an assertion of public policy against excluding sequentially caused losses).

193. *See* Lavitt, *supra* note 5, at 5–7 (discussing the importance of maintaining equilibrium in the insurance market by allowing insurance companies the freedom to draft policies excluding correlated risks).

194. Corban v. United Servs. Auto Ass'n, 20 So. 3d 601, 617 (Miss. 2009).

195. *Id.* at 614–15.

196. *Id.* at 617.

the accompanying disputes. Because insurance companies react to new judicial opinions with new policy provisions, insureds will encounter new provisions in their policies that attempt to exclude coverage.[197] Courts will once again be faced with balancing sympathy for victims of catastrophic events with the economic interests of the insurance industry.

Also noteworthy, the Mississippi Supreme Court did not rely on the "efficient proximate cause doctrine" in its analysis. The Fifth Circuit's analysis of the "efficient proximate cause" doctrine, while an accurate explanation of the default rule in Mississippi and its neutralization by the ACC clause, was not exactly on point, if it was an attempt to show why Mississippi did not have established, applicable hurricane case law.[198] Even in prior Hurricane Camille cases, the Mississippi Supreme Court did not apply "efficient proximate cause" in cases in which the wind and tidal surge operated to cause separate losses.[199] Rather, "efficient proximate cause" analysis was used for those instances when a single loss was the result of multiple perils acting in concert with one another.[200]

By focusing on "loss" and the separate nature of losses caused by wind and water in a hurricane event, an application of the "efficient proximate cause" doctrine was not required. In keeping with the court's definition of "concurrent," if the losses caused by wind and water were indeed separate and distinguishable, there was no need to apply "efficient proximate cause."[201] The Mississippi Supreme Court could have simply stated that the separate losses caused by wind and water did not require an application of efficient proximate cause and, therefore, the ACC clause did not apply. In other words, the court could have avoided an interpretation of the ACC clause altogether. Due to the Fifth Circuit's "*Erie* guess" on the matter, however, the court was obligated to examine the ACC clause and establish Mississippi law on the issue.

This newly established law did not strike down ACC clauses but also did not allow insurance companies to exclude all hurricane "damage" which could be caused by separate wind and water losses. The opinion appears to be an attempt to strike a balance between the homeowner's need to recover a greater portion of their losses and the interests of the insurance industry to contract around default rules. Upon a closer look, however, the court permits a very limited opportunity to apply the unambiguous portion of the ACC clause in hurricane-damage situations. This holding also creates other issues in need of resolution: did this establish a new default rule which does not allow exclusion of sequential losses, and will the court allow the insurance industry to contract around that rule? If

197. *See* JACKSON, *supra* note 192, at § 15:19 (explaining the attempts by insurance companies to draft policies in order to contract around judicial decisions).

198. *See supra* Part IV.C; *see supra* note 57.

199. *See supra* Part IV.C; *see supra* note 57.

200. *See supra* Part IV.C; *see supra* note 57.

201. *See supra* Part IV.C; *see supra* note 57.

the court is attempting to bar exclusion of sequential damages, the insurance industry may respond by leaving the gulf coast market.[202]

C. *The Difficult Burden for the Insurance Company*

Because the ACC clause did not operate to exclude losses attributable to wind damage, it was necessary to establish which party must bear the burden of proof in the subsequent action. The Mississippi Supreme Court did not break any new ground on this issue. Rather, well-established insurance law was called upon to provide the necessary guidelines. As in previous cases involving "all-risk" insurance policies, the insured party must first prove that a compensable loss occurred.[203] Then, if the insurer asserts the affirmative defense that the loss was caused by an excluded peril, the burden falls on the insurer to prove the exclusion by a preponderance of the evidence.[204]

Here, the Corbans must simply demonstrate that a loss occurred to their property insured by USAA under their all-risk policy.[205] Then, if USAA claims that part or all of the loss was caused by water damage, USAA must show by a preponderance of the evidence that the loss was not caused by wind but rather by water, acting either alone or concurrently with the wind.[206] Due to the nature and magnitude of damage and destruction caused by a hurricane, such determinations will not be quick or easy. With such a large amount of money at stake, both parties have much to lose, and, consequently, litigation over these claims could become protracted and expensive.[207]

The court's holding that the ACC clause did not apply to divisible losses caused by separate perils did not establish a decisive victory for the Corbans or defeat for USAA. Due to the difficulties involved in separating "property damage" into separate losses attributed to distinct perils, however, the insurance company faces a heavy burden to avoid coverage. This holding, therefore, presents USAA with formidable obstacles in any attempt to meet the burden of proving which losses were caused by wind, water, or a concurrent combination of the two. Because the burden falls on the insurance company, the insured is in a much better position to collect on their claims.

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202. *See* JACKSON, *supra* note 192, at § 15:19.

203. *See supra* Part IV.F (discussing the burden of proof in insurance claims and the insurer's burden to prove the affirmative defense of a loss being excluded in the policy).

204. *See supra* Part IV.F.

205. *See supra* Part V.B.3.

206. *See supra* Part V.B.3.

207. *See* Lavitt, *supra* note 5, at 5 (discussing the stakes involved in cases involving insurance coverage of catastrophic events); *see* Knutsen, *supra* note 9, at 978–81 (discussing the expense of causation litigation).

One suggested solution for such difficulties in proving causation is to follow an apportionment rule.[208] Where damage is caused by multiple perils, each peril is assigned a percentage of the damage, and the property owner recovers for the portion of the damage covered under the policy.[209] For a hypothetical hurricane, the different elements of wind, storm surge, etc. would be assigned certain percentages of total damage (taking into account the particular meteorological variables determined for the particular hurricane as well as the different areas affected, varying the percentages in different zones).[210] If 20% of the total damage in the homeowner's zone were apportioned to wind alone, then the homeowner would be indemnified for 20% of the total damage sustained. This method would lighten the burden for the insurance company and allow for easier claim settlement.[211] Apportionment would also allow for more certainty in insurance litigation, which would lead to greater judicial administrative economy.[212]

VII. CONCLUSION

Insurance companies have every right to formulate their own policies. Furthermore, insurance purchasers have a duty to read their policies in order to know what is covered. When those policies contain provisions, which purchasers cannot understand even when they do read them, and phrases with several possible meanings, the court must ensure that each party obtains a fair outcome when disputes arise over coverage. Because the insurance industry is regulated largely through state law, federal courts sitting in diversity must apply state law to these types of disputes. Constantly changing policies yield situations in which states may not have established law on the most current issues, and consequently, federal courts may make an "*Erie* guess" as to what the appropriate state law will be.

After several such guesses by the Fifth Circuit, *Corban v. USAA* provided the Mississippi Supreme Court the opportunity to disagree with the Fifth Circuit and to establish Mississippi law regarding insurance policies containing ACC clauses. For this reason, the *Corban* opinion is groundbreaking; however, the reasoning behind the opinion is by no means extraordinary. The Mississippi Supreme Court relied upon the same logical analysis from years ago: if separate losses are caused by separate perils, they are not concurrent, and the insurance company must indemnify for covered losses. Any underlying, unstated meaning of the opinion, as well as any future implications, are yet to be fully realized.

208. *See* Knutsen, *supra* note 9, at 977–86, 1010–12 (discussing the apportionment approach to concurrent causation and the need for consistency to lower the cost and increase the efficiency of insurance litigation).

209. *Id.*

210. This is a hypothetical application of Knutsen's apportionment discussion.

211. *See* Knutsen, *supra* note 9, at 977–86, 1010–12.

212. *Id.* (discussing the benefits of apportionment, but also stating that no jurisdiction has adopted such an approach to concurrent causation).